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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 953

ANNA BEDNO, JACOB BEDNO, SAMUEL J. RITHOLZ, SYLVIA RITHOLZ, MORRIS I. RITHOLZ, FANNY RITHOLZ, BENJAMIN D. RITHOLZ, SOPHIE RITHOLZ, Co-partners Doing Business Under the Assumed Name, Designation and Style of KING OPTICAL COMPANY,
Petitioners,

vs.

DAN B. FAST, AUGUSTUS N. ABBOTT, FRED N. HARRIS, EDWARD D. LA COURSE, NEWTON E. W. LENZ, as the Wisconsin Board of Examiners in Optometry, and WILLIAM J. McCAULEY, District Attorney for Milwaukee County, Wisconsin,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Wisconsin.

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INDEX.

	Page
Citations to opinion below	2
Jurisdiction	2
Questions involved	2
Constitutional and statutory provisions involved	3
Statement	3
How federal question is presented	5
Reasons for granting the writ	6
Appendix A—Circuit Court decision	11
Appendix B—Wisconsin Supreme Court opinion	26
Appendix C—Judgment	35
Appendix D—Constitutional and statutory provisions involved	36
Appendix E—Initial decision	39

Cases Cited.

Bethlehem Steel Co. v. New York Labor Board, 330 U. S. 767, 774, 775 ..... 8, 9

Charleston & W. C. R. Co. v. Varnville, 237 U. S. 597, 604 9

Federal Trade Commission v. National Casualty Co., 357 U. S. 560 ..... 6, 9

Garner v. Teamsters Union, 346 U. S. 485, 499-500 9

In the Matter of Benjamin D. Ritholz, F. T. C. Docket No. 6155 (1956) 7

Napier v. Atlantic Coast Line R. Co., 272 U. S. 605, 612-613 8

Railway Mail Association v. Corsi, 326 U. S. 88, 93 2

Schwegmann Bros. v. Calvert Distillers Corp., 341 U. S. 384 6

Williamson v. Lee Optical Co., 348 U. S. 483 10

Statutes Cited.

16 C. F. R., § 192.1 (d), 191.26 (d) (III), 192.3, 192.9 .. 7
15 U. S. C., § 41 et seq. 5
15 U. S. C., § 45 (a) 6
15 U. S. C., § 45 (b) 6
15 U. S. C., § 45 (c-d) 6
15 U. S. C., § 45 (l) 6
15 U. S. C., § 49-50 6
15 U. S. C., § 52 (a) (1) 6
15 U. S. C., § 53 6
15 U. S. C., § 55 (a) (1) 6, 9
15 U. S. C., § 55 (d) 7
15 U. S. C., § 1011 9
15 U. S. C., § 1012 (b) 9
28 U. S. C., § 1257 (3) 2
Wis. Stats., § 153.10 (1957) 4
Wis. Stats., § 153.11 (1957) 5
Wis. Stats., Sec. 269.56 (8) (1957) 5

Constitution Cited.

United States Constitution:
Article I, Section 8 3
Article VI, Section 2 3

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Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Wisconsin.

Petitioners pray that a Writ of Certiorari issue to review the final judgment of the Wisconsin Supreme Court entered in the above entitled case on March 3, 1959.

CITATIONS TO OPINION BELOW.

The memorandum opinion of the Circuit Court for Milwaukee County (Tr. 1-19)[1] is unreported and is printed in Appendix A, *infra*, pp. 11-25. The opinion of the Wisconsin Supreme Court (Tr. 54-61) is reported in 6 Wis. 2d 471, 95 N. W. 2d 396, and is reprinted in Appendix B, *infra*, pp. 26-34.

JURISDICTION.

The Wisconsin Supreme Court entered final judgment affirming the judgment of the trial court on March 3, 1959. The declaratory judgment, affirmed by the Wisconsin Supreme Court (Appendix C, *infra*, pg. 35), adjudged that the state statutes relating to optometry prohibited certain interstate advertising practices engaged in by the Petitioners and denied Petitioners' request for a permanent injunction restraining the enforcement of such state statutes. Since the Petitioners have in fact engaged in the practices declared unlawful under the state statutes, and have been denied injunctive relief against the enforcement of such statutes, the cause is justiciable here. *Railway Mail Association v. Corsi*, 326 U. S. 88, 93. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3).

QUESTIONS INVOLVED.

Whether the jurisdiction of the Federal Trade Commission to regulate the interstate advertising program of an optician engaged in interstate commerce is primary and exclusive thereby precluding the several states from exercising concurrent and supplementary authority to regulate such advertising program.

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[1] "Tr." refers to the certified transcript filed herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provisions involved are Article I, Section 8, and Article VI, Section 2 of the United States Constitution. The statutory provisions primarily involved are found in the Federal Trade Commission Act of 1938, 52 Stat. 111, 15 U. S. C., § 45 (a), 52 (a-b) and 55 (a) (1) and (d). They are reprinted in Appendix D, *infra*, pp. 36-38.

STATEMENT.

Petitioners are co-partners doing business as King Optical Company and are residents of the states of New York and Illinois (Tr. 20). Petitioners manufacture and sell optical goods. In the course of such business they engage in optical dispensing. This consists of the taking of facial measurements, fitting and adjusting frames, duplicating lenses and the grinding of lenses pursuant to an optometrist's prescription (Tr. 55).

With the exception of Respondent McCauley, the Respondents are members of the Wisconsin State Board of Optometry. Respondent McCauley is the District Attorney for Milwaukee County and is charged with the local enforcement of the state laws relating to the practice of optometry (Tr. 54).

Petitioners own and operate a factory located in Chicago, Illinois, at which optical goods are manufactured and processed. These goods are sold through branch offices owned and operated by Petitioners throughout the United States and Canada. Orders are taken from customers at these branch offices, including the Milwaukee office, and are sent to the Chicago factory to be filled according to the needs of the individual customer. The eye glasses or lenses

are returned to the branch office where the frames are fitted to the customer's face (Tr. 55).

All advertising contracts are made in Chicago and advertisements are placed in newspapers throughout the country from the Chicago office. All accounting and banking activities incidental to the operation of the branch offices are carried on in Chicago. Petitioners' annual sales in interstate commerce exceed two and one-half million dollars (Tr. 56).

Petitioners maintain a one-price policy. Single vision glasses are sold for $9.98; bifocal glasses are $4.98 additional. Upon opening its branch office in Milwaukee on September 16, 1957, Petitioners placed advertisements in the local newspapers containing statements such as "all single vision glasses at one low price, including frames and lenses. Bifocals, if desired, at small additional charge" (Tr. 56). Petitioners also sought to place an advertisement in the Milwaukee Sentinel, a newspaper of state-wide distribution. However, the newspaper declined to accept the advertisement on the ground that it constituted price advertising in violation of the state laws regulating optometry (Tr. 27-28, 42).

It is conceded that the advertising which Petitioners placed in Milwaukee newspapers and which they sought to place in the Milwaukee Sentinel contained complete and truthful statements. The optical goods actually sold were of the type, quality and description set forth in the advertisements (Tr. 56).

On November 27, 1957, Petitioners commenced an action for declaratory judgment in the Milwaukee County Circuit Court. Petitioners sought judgment declaring the state optometry statutes unconstitutional, as applied to the Petitioners, on the ground, among others, that the Federal Trade Commission Act, as amended by the Wheeler-Lee

Act of 1938, 51 Stat. 111, 15 U. S. C., § 41, *et seq.* (referred to as the "Act") pre-empted the field of interstate advertising in the optical industry (Tr. 13-18, 61). Petitioners also sought, as is permitted under local practice [Wis. Stats., Sec. 269.56 (8) (1957)], a permanent injunction restraining the enforcement of such statutes (Tr. 34).

The trial court held that the advertisements described above were unlawful under the state optometry statutes (Tr. 18-19) and expressly rejected Petitioners' contention that exclusive jurisdiction to regulate such advertising was vested in the Federal Trade Commission (referred to as the "Commission") (Tr. 13-18). On appeal to the Wisconsin Supreme Court, Petitioners renewed their contention that the field has been pre-empted by the Act. The Wisconsin Supreme Court considered this contention but rejected it, reasoning that the failure of Congress to prohibit truthful price advertising by those who engaged in the optical industry demonstrates an intent to permit the states to prohibit such advertising (Tr. 61). This Petition for Certiorari seeks review of that determination.

HOW FEDERAL QUESTION IS PRESENTED.

The Petitioners' Bill of Complaint affirmatively alleged that jurisdiction to regulate Petitioners' advertising practices has been pre-empted by the applicable federal statutes (Tr. 32). The trial court considered but rejected the contention that exclusive jurisdiction was vested in the Federal Trade Commission (Tr. 13-18). The contention was considered and rejected by the Wisconsin Supreme Court (Tr. 61).

REASONS FOR GRANTING THE WRIT.

1. During the past two decades widened channels of interstate commerce, coupled with vastly expanded federal regulation of such commerce, have brought into sharp focus the imperative need for national uniformity in those areas in which the Congress has acted. The instant case squarely poses for the first time the question of the extent to which Congress, by enacting comprehensive legislation regulating interstate advertising, which is likely to induce the purchase of "food, drugs, devices or cosmetics," has occupied that field to the exclusion of the several states.[2] 15 U. S. C., § 52 (a) (1).

The Act empowers and directs the Commission to prevent any person from using "unfair or deceptive acts or practices in commerce." 15 U. S. C., § 45 (a). Administrative hearings and cease and desist orders against unfair or deceptive practices are established. 15 U. S. C., § 45 (b). Judicial review and enforcement of Commission orders is vested exclusively in the United States Courts of Appeal. 15 U. S. C., § 45 (c-d). Violation of a final order subjects the offender to a civil penalty of not more than $5,000.00 for each violation. 15 U. S. C., § 45 (1).

Detailed procedures for the compulsory attendance of witnesses, examination of records and the taking of depositions are found in the Act. 15 U. S. C., §§ 49-50. Authority to commence a federal district court action for a temporary injunction restraining any advertisement violative of the Act is conferred upon the Commission by 15 U. S. C., § 53. A comprehensive definition of the term "false advertisement" is found in 15 U. S. C., § 55 (a) (1).

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[2] Tangential problems under the act were considered in *Federal Trade Commission v. National Casualty Co.*, 357 U. S. 560, and *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384.

2. The prohibition against deceptive advertisements, designed to induce the purchase of "devices," applies to persons such as the Petitioners who are engaged in the optical industry. The Act defines the term "devices" as including "instruments, apparatus and accessories intended (1) for use in . . . medication . . . of disease in man . . .; or (2) to affect . . . any function of the body of man. . . ." 15 U. S. C., § 55 (d). Implementing its statutory mandate to regulate advertising practices of those engaged in the optical industry, the Commission has promulgated a comprehensive code which interprets the Act as it applies to the advertising practices of wholesalers in the optical industry. 16 C. F. R., § 192.1 (d), 191.26 (d) (III), 192.3, 192.9. A similar code has been promulgated for the sun glass industry.

The existence of the Commission's authority to regulate the interstate advertising program of the Petitioners is perhaps best demonstrated by the fact that the Commission has in the past exercised jurisdiction over the Petitioners' price advertising practices. *In the Matter of Benjamin D. Ritholz*, F. T. C. Docket No. 6155 (1956). The decision and order of the Commission is attached as Appendix E, *infra*, pp. 39-56, to this petition.

3. In view of this comprehensive legislative plan and previous exercise of jurisdiction by the Commission, the Petitioners respectfully submit that state jurisdiction to regulate its interstate advertising program has been pre-empted by the Act. The state statutes involved, which were held applicable to the Petitioners, make it unlawful for any person to advertise any definite price on lenses, frames or glasses. Violation of this state law is punishable by both fine and imprisonment.[3] As construed by

[3] Wis. Stats., § 153.10 (1957), provides:

"It shall be unlawful for any person to advertise, either directly or indirectly, by any means whatsoever, any definite or

the court below, these statutes prohibit all advertising of price by the Petitioners without regard to the truth or falsity of the advertising (Tr. 58-59).

Rejecting Petitioners' contention that the Act has displaced state authority to regulate interstate advertising of optical devices, the court below held that Congress, by refraining from imposing a ban upon truthful advertising, thereby conferred upon the states the right to permit or prohibit such advertisements in commerce (Tr. 61). Petitioners respectfully submit that this holding flies in the face of the manifest intention of Congress and the applicable decisions of this Court.

It has long been the rule that Congress, by enacting a comprehensive, detailed legislative program, and creating a federal administrative agency for the purpose of enforcing the legislation, thereby evidences an intention to occupy the field. *E. g., Bethlehem Steel Co. v. New York Labor Board,* 330 U. S. 767, 775; *Napier v. Atlantic Coast Line R. Co.,* 272 U. S. 605, 612-613. "A state law is not to be declared a help because it attempts to go farther than

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indefinite price or credit terms on lenses, frames, complete glasses or any optometric services; to advertise in any manner that will tend to mislead or deceive the public; to solicit optometric patronage by advertising that he or some other person or group of persons possess superior qualifications or are best trained to perform the service; or to render any optometric service pursuant to such advertising."

Wis Stats., § 153.11 (1957), provides:

"Any person not lawfully authorized to practice optometry, who shall practice optometry, or shall hold himself out as a practitioner thereof, or who shall impersonate another practitioner, or who shall violate any provisions of this chapter, or any rule or regulation made under authority thereof, shall be punished for the first offense by a fine not less than $50 nor more than $200 or by imprisonment for not more than 3 months, or both. And for a subsequent offense by a fine not less than $200 nor more than $500, or by imprisonment for not less than 3 nor more than 6 months, or both such fine and imprisonment."

Congress has seen fit to go. . . . The legislation is not saved by calling it an exercise of the police power. . . . " *Charleston & W. C. R. Co. v. Varnville*, 237 U. S. 597, 604. *See also: Garner v. Teamsters Union*, 346 U. S. 485, 499-500.

Congress knows full well that "when federal administration has made comprehensive regulations effectively governing the subject matter of the statute, . . . a state regulation in the field of the statute in invalid." *Bethlehem Steel Co. v. New York Labor Board*, 330 U. S. 767, 774. For this reason, Congress specifically reserved to the states those areas, otherwise covered by the Act, which Congress intended to be subject to state authority. Thus, Congress provided that the jurisdiction of the Commission to regulate the business of insurance is not to be exercised in cases in which the business is regulated under state law. 15 U. S. C., § 1012 (b). Congress also provided that the Act should not be construed to raise any barrier to the regulation of the insurance business by the several states. 15 U. S. C., § 1011. *Cf. Federal Trade Commission v. National Casualty Co.*, 357 U. S. 560. *Significantly, however, no similar preservation of state jurisdiction was made applicable with respect to the regulation of interstate advertising designed to induce the purchase of "food, drugs, devices, or cosmetics."* The failure of Congress to confer jurisdiction upon the states to enact concurrent or supplementary legislation cogently demonstrates the exclusive and primary nature of the Commission's authority in this field.

Moreover, the court below erroneously assumed that the Commission has no authority to regulate truthful advertising statements. The Act itself affirmatively directs the Commission to consider "the extent to which the advertisement fails to reveal facts." 15 U. S. C., § 55 (a) (1). Obviously an advertisement containing completely truthful statements can be a false advertisement within

the meaning of the statute. As the Commission put it in the "Guides Against Deceptive Pricing" adopted on October 2, 1958:

> "Advertisements as a whole may be completely misleading although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because advertisements are composed or purposely printed in such a way as to mislead."

Hence, the distinction drawn by the court below does not afford a basis for the exercise of state jurisdiction in the circumstances of this case.

This Court has had occasion to consider, in the context of a claimed deprivation of due process, the power of the several states to regulate the optical industry (*Williamson v. Lee Optical Co.*, 348 U. S. 483). However, this Court has not had occasion to consider whether Congress, by enacting the Federal Trade Commission Act regulating interstate advertising designed to induce the purchase of food, drugs, devices or cosmetics, has thereby occupied that field. The question is one of national importance which should be decided by this Court.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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APPENDIX A.

Circuit Court Decision.

Pursuant to a formal stipulation, the parties agreed to waive trial of the facts and also to waive their respective motions for temporary injunction. The court is to consider each of their motions as a motion for summary judgment. The defendants have withdrawn their demurrer, thus avoiding any problems such as were considered in Ritholz v. Johnson (1944), 244 Wis. 494.

The complaint identifies the plaintiffs as co-partners dealing in optical goods and the defendants as an officer or as members of the Wisconsin Board of Examiners in Optometry; in addition, the district attorney of Milwaukee County is a named defendant.

The plaintiffs allege that they function as dispensing opticians and do not practice optometry. They have an office in Milwaukee which they operate under the name of King Optical Company. If a customer comes in without a prescription, he is handed a list of optometrists and oculists from which the customer can make a selection. The order is transmitted to Chicago where the eyeglasses are manufactured and then sent to the Milwaukee office. The complaint also avers that all advertisements are placed from Chicago.

The complaint further states that the defendants have threatened to prosecute plaintiffs for advertisements published in the Milwaukee Sentinel and that the very existence of sections 153.10 and 153.11 has induced the Milwalkee Journal to refuse to publish similar advertisements. Copies of advertisements published by the Milwaukee Sentinel are attached to the complaint. A proposed advertisement (Exhibit J) setting forth a specific price

($9.98) is attached to the complaint, and it is alleged that this advertisement was rejected by the Milwaukee Sentinel. The advertisements are alleged in the complaint to be "full, fair, complete and truthful."

The defendants in their answer set forth that the dispensing optician "is complementary to the practice of optometry" and "is the medium through which the professional services of the ophthalmologist or optometrist . . . are translated and fabricated" into eyeglasses. The answer also recites that the eyeglasses fabricated at Chicago are not ready for wear; "it is almost invariably necessary for the optical dispenser to make various minor adjustments of the bridge, bows and frames in order to assure comfort to the patient as well as to see that the lenses are properly centered over the eyes of the patient."

The plaintiffs ask that they have judgment declaring sections 153.10 and 153.11 inapplicable to the plaintiffs and to the advertisements in question, and that such sections are unconstitutional; they also seek injunctive relief relative to preventing enforcement or the threat thereof as to section 153.10. The plaintiffs further ask that the defendants be restrained from inducing newspapers to refuse the plaintiffs' advertisements.

The defendants demand judgment declaring the validity of the same sections of the Wisconsin statutes and specifically as valid in their application to the advertisements in question; the defendants also ask that the plaintiffs be permanently enjoined from violating section 153.10.

Three principal contentions are advanced by the plaintiffs:

(1) It is argued that section 153.10 prohibits advertising by optometrists and that when it uses the words "any person" the statute means "any person who is an optometrist."

(2) If the words "any person" mean dispensing opticians as well as optometrists, then section 153.10 is unconstitutional.

(3) It is contended that section 153.10 cannot be enforced because the plaintiffs are engaged in interstate commerce and Congress has pre-empted the subject matter and given enforcement to the Federal Trade Commission.

I. Construction of Words "Any Person" in Section 153.10.

Section 153.10 provides as follows:

> "Prohibited advertising. It shall be unlawful for any person to advertise either directly or indirectly by any means whatsoever any definite or indefinite price or credit terms on lenses, frames, complete glasses or any optometric services; to advertise in any manner that will tend to mislead or deceive the public; to solicit optometric patronage by advertising that he or some other person or group of persons possess superior qualifications or are best trained to perform the service; or to render any optometric service pursuant to such advertising."

The plaintiffs argue that the whole of Chapter 153 relates to licensing, examining and registering optometrists. Dispensing opticians are defined in section 153.01 (2) and are expressly exempt from the licensing provisions by section 153.02 (1). Statutory construction requires a finding, argue the plaintiffs, that "any person" means "any person who is an optometrist."

The first and most obvious difficulty with the plaintiffs' argument is, as Chief Justice Ryan put it in Beaudette v. Fond du Lac (1876), 40 Wis. 44, 47:

> "The trouble is that the statute does not say so. And we must hold that if the legislature had so intended, it would have said so."

The plaintiffs maintain that the purpose of Chapter 153 is to regulate optometry. However, the broad purposes of the chapter are expressed in Section 153.12: to protect "the interest of public health, safety and welfare." There is nothing ambiguous in the language used by the legislature, and there is no reason why the legislature could not require the licensing of optometrists and, in the same chapter, bar *all persons* from certain types of advertising relating to eyeglasses.

A comparable question arose in Ritholz v. Commonwealth (1945), 184 Va. 339, 35 S. E. (2d) 210, 222, where the Virginia statute made it unlawful for "any person" to advertise prices of eyeglasses, "low prices," "guaranteed glasses" and similar language. The Virginia court rejected the objection that the language of the act was broader than the title which referred to "Optometry."

In State v. Roneas (1953), 223 La. 839, 67 So. (2d) 99, 101, the statute provided that "no person" could advertise the furnishing of glasses for a price. The provision was contained in a chapter which regulated optometry, but the statute was held applicable to an optician who advertised that he would fill oculists' prescriptions.

The words "any person" in section 153.10 are clear and unambiguous; giving them their ordinary meaning leads to no absurd conclusions. I can see no justification for interpre- [sic] As the Court said in Estate of Singer (1927), 192 Wis. 524, 527:

> "The intention of the law-making power must be ascertained from the language used to express that intention, and it is only when the language used is uncertain, indefinite, or ambiguous that resort may be had to construction. Here the language of the act is perfectly plain. . . . Hence there is no room for the application of rules of construction. The intent of the law-making power is that which is found clearly expressed in the language used in the act."

II. Constitutionality of Section 153.10.

Section 153.10 was held constitutional in Ritholz v. Johnson (1945), 246 Wis. 442. In that case the circumstances were found to demonstrate that the plaintiffs were perpetrating a "fraud on the public." The Court noted that there was "disagreement in decisions of courts of last resort on the proposition that an ordinary trader cannot be prevented from advertising the price at which he will sell eyeglasses . . ." (246 Wis. 442, 454).

Ritholz v. City of Detroit (1944), 208 Mich. 258, 13 N. W. (2d) 283, is cited in support of the plaintiffs' contentions. There it was ruled that the vendors had a constitutional right to advertise prices of eyeglasses; the ordinance which sought to prevent such advertising was held to have "no relation to public health and is an unlawful interference with private business" (p. 284). The Court considered that the ordinance sought to correct a "business evil", and was not related to health, safety or general welfare.

A like view is expressed in Ritholz v. City of Salt Lake (1955), 3 Utah (2d) 385, 284 P. (2d) 702, where the Court stressed the need for freedom of competition. That price advertising might "deceive the unwary" was answered by the Court with the observation that such might be said of all forms of advertising. Said the Court at page 706:

> "The very element of competition through price advertising may well have beneficial effects upon the quality of the product sold which would offset any possible slight detriment to health that may be hazarded if such advertising were curtailed. Whatever adverse effect might result, and it seems open to serious question whether any such effect would actually eventuate from this advertising, we are of the opinion that it does not have any such substantial bearing on public health as to justify this extension of the police power into the regulation of private business and the

violation of the right to freely advertise and sell one's property."

See also State ex rel. Booth v. Beck Jewelry Enterprises, Inc. (1942), 220 Ind. 276, 41 N. E. (2d) 622.

While fraudulent advertising was involved in the case decided by the Wisconsin Supreme Court (Ritholz v. Johnson [1945], 246 Wis. 442), even truthful advertising has been held properly barred by an appropriate statute. Semler v. Oregon State Board of Dental Examiners (1934), 294 U. S. 608, 613. With reference to dentists' advertisements which "induced patronage" the Court said:

> "The legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatement."

In Ritholz v. Commonwealth (1945), 184 Va. 339, 35 S. E. (2d) 210, 223, the Court was aware that some courts "hold that provisions prohibiting such advertisements quoting prices are arbitrary and an unreasonable restraint of a lawful business"; nevertheless, the Court went on to hold as follows:

> "The better reasoned cases hold that restrictions and regulations of the sale of eyeglasses are measures directed to the prevention of substantial harm to the public health and are within the exercise of the police power of the State."

The case of City of Springfield v. Hurst (1943), 144 Ohio St. 49, 56 N. E. (2d) 185, 188, reached the same conclusion as the Virginia court. The optician's role in the production of eyeglasses was outlined in these terms:

> "'In a certain respect, there is a marked similarity between the scope of the work of the dentist and the

scope of the combined work of the optometrist and optician. The dentist produces fitted teeth, the optometrist and optician produce fitted eyeglasses complete. But why should legislation against bait advertising as to the price of lenses or complete eyeglasses be held valid as to the optometrist and not as to the optician? Is the prescription more important in relation to health than the grinding according to prescription? Lenses must be prepared by those trained in the grinding. Quality of material and skill in workmanship are prime essentials in producing the finished lenses. Poor quality and poor grinding will naturally result from the desire to sell spectacles in quantity at a low advertised price, with the purpose of underselling the optometrist and other opticians who do not indulge in such advertising. Poor and improperly ground lenses will impair the eyesight of the person to whom they are sold as properly fitted. Thus, legislation prohibiting such bait advertising has a real and substantial relationship to the public health whatever vendor employs the injurious method. The result of forbidding the professional practitioner to resort to such advertising and permitting the optician (or even the retail vendor) to indulge in the harmful practice does not eradicate the evil. The whole field must be covered if protection is to be afforded the public.

"Therefore an ordinance which prohibits advertising the price of lenses or complete eyeglasses is a reasonable and valid exercise of the police power."

The United States Supreme Court has recently recognized the propriety of a state legislature's proscribing solicitations for the sale of eyeglass frames. In Williamson v. Lee Optical Co. (1955), 348 U. S. 483, 490, the Court said:

"An eyeglass frame, considered in isolation, is only a piece of merchandise. But an eyeglass frame is not

used in isolation, as Judge Murrah said in dissent below; it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health. Therefore, the legislature might conclude that to regulate one effectively it would have to regulate the other. Or it might conclude that both the sellers of frames and the sellers of lenses were in a business where advertising should be limited or even abolished in the public interest. Semler v. Dental Examiners, supra. The advertiser of frames may be using his ads to bring in customers who will buy lenses. If the advertisement of lenses is to be abolished or controlled, the advertising of frames must come under the same restraints; or so the legislature might think. We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers."

The legislature of Illinois adopted a law which barred optometrists from accepting employment by opticians who advertised in a forbidden manner. In Roberts Optical Co. v. Dept. of Registration and Education (1954), 4 Ill. (2d) 290, 122 N. E. (2d) 824, 826, the Court upheld the legislation and said:

"The power of the legislature to regulate advertising practices does not depend upon whether plaintiff's occupation is called a trade or a profession, but upon whether it is of such a character that commercialized exploitation might endanger the public health."

In State v. Rones (1953), 223 La. 839, 67 So. (2d) 99, the Court stated the problem in these terms (at p. 105):

"The question presented by this case is whether a statute which prohibits any person, thereby including a retail dealer, from advertising the sale of glasses,

lenses, etc., for a price or without cost is a reasonable regulation within the police power of the State and therefore constitutional."

Thereupon, the Louisiana Court noted the decisions which have held the regulation to be unrelated to the public health or welfare, but nevertheless ruled, at page 105, as follows:

> "We are in accord with the views of those upholding such statutes. These courts have decided that the statutes are a reasonable exercise of the police power because they prevent 'bait advertising', which attracts the unwary to purchase inferior glasses; eliminate the temptation to, and the pressure upon, customers that result from the assurance that no more than a named price will be charged; protect an uncautious and unwary public from being misled and deceived; prevent the increase in sales and the incidental harm that come from unfitted eyeglasses; eliminate to some extent poor quality and poor workmanship which naturally result from the desire to sell spectacles in quantity at a low advertised price for the purpose of underselling competitors."

The Supreme Judicial Court of Massachusetts had before it the case of a dispensing optician who advertised with prices contrary to a state statute. Commonwealth v. Ferris (1940), 305 Mass. 235, 25 N. E. (2d) 378, 380. The Court weighed the rights of a citizen to engage in a lawful occupation and to advertise. The limitation on those rights, under the police power, was put in these terms:

> "Where the public are not cautious or watchful in their buying habits and are likely to be misled, the Legislature may require not only the absence of active deception . . . but also affirmative measures to prevent misunderstanding."

The Court's conclusion was as follows (at p. 381):

> "The Legislature evidently was not prepared to prohibit the sale of eyeglasses and lenses as merchandise, to be selected by the buyer. But it was prepared to discourage it, by eliminating the temptation to and pressure upon customers that result from the assurance that no more than a named price will be charged, or that the price is less than competitors ask. As in Roschen v. Ward, supra, that shorter step is consistent with the Constitution."

The editors of the Note in 56 Col. L. Rev. 1019 (Nov. 1956) observed that some courts have regarded eyeglasses as commercial merchandise and other courts have stressed that the public's interest in ocular health outweighs consideration of price competition. The editors' conclusions are set forth at page 1072 as follows:

> "By forbidding price advertising the state can remove much of the temptation to purchase cheap and possibly defective spectacles solely on account of low price. Such an objective is a legitimate end of government, and it would therefore seem that such absolute prohibitions should be held constitutional."

I believe that Section 153.10 is a constitutional exercise of the police power of this state.

III. Pre-emption by Federal Government.

The plaintiffs vigorously contend that the Wheeler-Lea amendments to the Federal Trade Commission Act represent a pre-emption of this field by the United States and, accordingly, it is argued state regulations are wholly precluded. The plaintiffs' complaint sets forth substantial interstate activity on the part of the plaintiffs.

The federal statute is primarily directed at false advertising, whereas the Wisconsin statute forbids any price

advertising regardless of whether deception is practiced. The mere fact that state legislation goes beyond the federal enactment does not necessarily preserve the state law if there is an apparent federal intention to pre-empt the field. Charleston & W. C. Ry. Co. v. Varnville (1915), 237 U. S. 597, 604.

Can the State of Wisconsin regulate the plaintiffs' advertising in this state? An affirmative answer is suggested in Ritholz v. Ammon (1942), 240 Wis. 578, 588, where the Court said:

> "The frames are necessarily fitted in Wisconsin. While the rest of the work is done in Chicago, and while evidently for the purpose of bringing as much of their business as possible within the scope of 'interstate commerce' the glasses are made in Chicago, title passes there, and delivery is directly to the purchaser of the glasses, it is evident that plaintiffs' local activities are something more than mere incidents to transactions in interstate commerce. . . . While under the cover of exercising its police power Wisconsin cannot undertake what amounts to regulation of interstate commerce, police regulations, reasonable in themselves, addressed to local activities and bearing a genuine relation to the welfare of people of this state, are not invalid by reason of the fact that they incidentally affect interstate commerce."

A similar point of view is expressed in the case of Metropolitan Finance Corp. v. Matthews (1953), 265 Wis. 275, 278, where Justice Broadfoot expressed the general rule as follows:

> "If plaintiff's business, although in interstate commerce, has incidents and requires activities within the state intimately related to local welfare, then those incidents and activities are subject to state regulation under the police power, unless Congress has, by

appropriate legislation, pre-empted the field with reference thereto."

The question of pre-emption was considered by the United States Supreme Court in Savage v. Jones (1911), 225 U. S. 501, 533, where the Court said:

> "For when the question is whether a Federal Act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power. . . .
>
> "But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State."

Can it fairly be said that Congress has evidenced an intention to occupy the field to the total exclusion of state control? In my opinion, the United States has not evidenced an intention to exclude states from exercising their police powers on this subject. The state law is not conflicting with the federal law, nor is there reason to anticipate irreconcilable enforcement problems. "There is no occupational rule which compels Congress to occupy the whole field," said the Court in Kelly v. Washington (1937), 302 U. S. 1, 10. That Court went on to say:

> "Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regu-

lation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'"

The plaintiffs contend that after the decision of the Wisconsin Supreme Court in the case of Ritholz v. Ammon, the United States Supreme Court rejected the interpretation of that case, so far as state jurisdiction is concerned, by its decision in La Crosse Telephone Corp. v. Wis. E. R. Board (1949), 336 U. S. 18, 25. There the Court pointed out that where state and federal labor boards both were asserting control over a dispute involving certification of a bargaining unit, the situation was "too fraught with potential conflict to permit the infrusion of the state agency," and at page 26 the Court said:

> "The uncertainty as to which board is master and how long it will remain such can be as disruptive of peace between various industrial factions as actual competition between two boards for supremacy."

A comprehensive Note on the regulation of advertising appears at 56 Col. L. Rev. 1019 (Nov., 1956), where the editors discuss pre-emption and the commerce clause. At page 1073 the Note states:

> "As to interference with interstate commerce, there is probably little question of the validity of state statutes penalizing false or misleading advertising, or prohibiting the advertising of commodities generally recognized as socially undesirable, so long as they are non-discriminatory and reasonable. It seems clear that, absent federal legislation or an overriding need for national uniformity, the states may regulate commerce

in the interest of public health or welfare, although such regulation incidentally affects interstate commerce."

As to the intent of Congress, the Note editors comment as follows at page 1074:

"Although there is little relevant case law, it seems unlikely that Congress, in passing the FTC Act, intended to preempt the entire field of advertising control. . . ."

"An examination of the legislative history of the Federal Trade Commission Act, note 9 supra, and the Wheeler-Lea Amendment, note 25 supra, discloses no indication of legislative intent to exclude state action."

". . . Congress has not provided as extensive administrative control, nor as elaborate regulatory procedures as are contained, for example, in federal labor legislation, which has been held to preempt much state regulation. . . ."

I am persuaded that the United States did not intend to preclude the State of Wisconsin from exercising its police power to restrict price advertising relating to eyeglasses. The program of Congress regarding control of advertising is not of such a character as to require uniformity or to exclude separate state regulation. The prospect of conflicting enforcement is negligible. The two laws may co exist without repugnance and without operational incompatibility.

Conclusion.

It is my opinion that the words "any person" in section 154.10 includes the plaintiffs, and that such section is constitutional and that it is enforceable notwithstanding the federal government's interest in the same subject matter.

I also consider that the advertisements annexed to the complaint are within the grip of the aforementioned stat-

ute; the advertisements "either directly or indirectly" set forth a "definite or indefinite price." Each advertisement ("B" through "J") expressly refers to the sales price as "low." The defendants, in my opinion, are entitled to judgment declaring the validity of the statute in question and specifically valid so far as it relates to the advertisements in question.

However, the defendants are not entitled to injunctive relief. Section 153.11 is also deemed constitutional, and it is broad enough to cover the plaintiffs herein. This section provides significant punishments for violations of "any provisions of this chapter." Accordingly, there is an adequate remedy at law, and there is no necessity for the court's using its equitable power of injunction. The penalties under the statute are sufficient to protect the public and to assure that there will be compliance with the provisions of Chapter 153. The plaintiffs now have and should retain the right to advertise, provided it does not offend under section 153.10. As suggested in Ritholz v. Johnson (1945), 246 Wis. 442, 445, the fact that plaintiffs may be prosecuted under Chapter 153 "constitutes an adequate legal remedy and thus bars an action in equity."

Defendants may present an appropriate order consistent with this decision for signature. Such order shall be exhibited to plaintiffs' counsel at least three (3) days before being presented to the court for signature.

/s/ Myron L. Gordon,
Circuit Judge.

Dated at Milwaukee, Wisconsin, this 20th day of March, 1958.

APPENDIX B.

Wisconsin Supreme Court Opinion.

Appeal from a judgment of the circuit court for Milwaukee county: Myron L. Gordon, Circuit Judge. *Affirmed.*

Action commenced by plaintiffs Anna Bedno, Jacob Bedno, Samuel J. Ritholz, Sylvia Ritholz, Morris I. Ritholz, Fanny Ritholz, Benjamin D. Ritholz, Sophie Ritholz, co-partners doing business as King Optical Company, against defendants Dan B. Fast, Augustus N. Abbott, Fred N. Harris, Edward D. La Course, Newton E. W. Lenz, as the Wisconsin Board of Examiners in Optometry, and William J. McCauley, District Attorney for Milwaukee county, for declaratory judgment and injunction declaring secs. 153.10 and 153.11, Stats., inapplicable to plaintiffs, or unconstitutional, and enjoining defendants from enforcing the same. On motions for summary judgment on the pleadings by both parties, the trial court found that the statutes were applicable to plaintiffs and that they were constitutional, denied the injunction and granted judgment on defendants' motion. From that judgment plaintiffs appeal.

The facts will be stated in the opinion.

Martin, C. J. The statutes involved are:

> Sec. 153.10 "It shall be unlawful for any person to advertise, either directly or indirectly, by any means whatsoever, any definite or indefinite price or credit terms on lenses, frames, complete glasses or any optometric services; to advertise in any manner that will tend to mislead or deceive the public; to solicit optometric patronage by advertising that he or some other person or group of persons possess superior qualifications or are best trained to perform the service; or to render any optometric service pursuant to such advertising."

Sec. 153.11 "Any person not lawfully authorized to practice optometry, who shall practice optometry, or shall hold himself out as a practitioner thereof, or who shall impersonate another practitioner, or who shall violate any provisions of this chapter, or any rule or regulation made under authority thereof, shall be punished for the first offense by a fine not less than $50 nor more than $200, or by imprisonment for not more than 3 months, or both. And for a subsequent offense by a fine not less than $200 nor more than $500, or by imprisonment for not less than 3 nor more than 6 months, or both such fine and imprisonment."

None of the facts are in dispute, it being stipulated by the parties that the allegations contained in the complaint and answer, together with the exhibits attached thereto, constitute all the evidence in the case.

Plaintiffs are manufacturers and merchants of optical goods. They engage in the practice of optical dispensing, which consists of taking facial measurements, processing, fitting and adjusting mountings, frames and lenses in the filling of prescriptions. They duplicate, replace and reproduce such devices without prescription where no optometrical service is required. Plaintiffs own and operate a factory at Chicago for the manufacturing and processing of optical goods, as well as branches in numerous cities of the United States and Canada for the dispensing of such goods. The orders taken from customers at these branches, including the Milwaukee office, are sent to the Chicago factory to be filled according to the prescriptions. The eyeglasses or lenses are returned to the branch office where the frames are fitted to the customer's face.

All advertising contracts are made in Chicago and advertisements are placed in newspapers from the Chicago office. All accounting and banking activities incidental to the operation of the branch offices are carried on in Chicago.

Annual sales of the business, between the Chicago office and the various branches, exceed two and one-half million dollars.

A one-price policy is maintained by the plaintiffs. Single-vision eyeglasses are $9.98; bifocal glasses are $4.98 additional. These prices include any correction, size, style, shape or color of lenses or frames.

On opening their branch in Milwaukee on September 16, 1957, plaintiffs placed advertisements in the local newspapers containing statements such as, "All single-vision glasses at one low price including frames and lenses. Bifocals, if desired, at small additional charge." They have also published and circulated matter which advertises that glasses may be obtained for $9.98 complete with frames and lenses. There is no allegation in the pleadings that any of the statements contained in said advertisements are false, misleading, fraudulent, deceiving, or for the purpose of causing misunderstanding. It is admitted that such statements are full, fair, complete and truthful, and all articles so advertised are actually of the type, kind, quality and description as set forth in the advertisements.

Three questions are presented on appeal, the first of which is:

Are secs. 153.10 and 153.11, Stats., which prohibit the advertising of prices of complete glasses, applicable to plaintiffs, who do not practice optometry, or to their price advertising?

As to the purposes of ch. 153, the legislature declared in sec. 153.12:

> "This chapter is passed in the interest of public health, safety and welfare and its provisions shall be liberally construed to carry out its objects and purposes."

Sec. 153.10, Stats., must, therefore, be read and interpreted with those purposes in mind.

The prohibition of price advertising of glasses is directed to "any person." Plaintiffs argue that ch. 153 is entitled "Optometry" and that analysis of the chapter as a whole, as well as its legislative history, indicates that sec. 153.19 is intended to be limited in its application to persons practicing optometry. We cannot agree. As observed by the learned trial court, the words "any person" are clear and unambiguous and there is no room for construction. See Callaghan's Wisconsin Digest, Statutes, sec. 174.

The fact that the prohibition applies to any price advertising on lenses, frames, complete glasses *"or any optometric services"* does not result in the modification of the language preceding the conjunction "or." An optician, while not required by the law to be licensed, dispenses lenses, frames and complete glasses.

Considered in the light of the purpose of the statute, we can only conclude that sec. 153.10 applies to opticians as well as optometrists. The optometrist is one who measures defects of the eye and applies the principles of optics to prescribe corrections in vision. The optician's business is that of grinding lenses according to the prescription and fitting the completed glasses to the face of the customer. It can hardly be argued that the regulation of optometry—to insure that persons' eyes are properly tested and their individual needs properly prescribed for—is not in the interest of public health. But to permit such a prescription to be translated into eyeglasses which are the product of poor material and craftsmanship by opticians interested in underselling their competitors, is to defeat the purpose of the statute. If the public is not protected from unscrupulous practices by both optometrist and optician, it is not protected at all.

The legislative history of sec. 153.10 (created by ch. 273, Laws of 1943, introduced as Bill 390, A) shows that it was drafted by an attorney for the department of agriculture and presented by a special committee representing the state and the optometric association. It would be entirely unreasonable to presume that the members of such a committee would sponsor a bill which would have the effect of prohibiting price advertising of glasses by optometrists, but not by opticians.

Retail stores which are permitted to sell eyeglasses of a certain type incidental to their other business are prohibited by sec. 153.02 from advertising the same, except by price marking on the glasses. Is the purpose of the chapter served by prohibiting advertising by optometrists and dime stores, for instance, but not by opticians?

We must hold that the statute means just what it says and applies to plaintiffs as "persons" engaging in advertising relating to the prices of "lenses, frames, complete glasses."

Plaintiffs argue that the advertising in question is full, fair, complete and truthful, and that sec. 153.10 is intended to prohibit only fraudulent and misleading advertising, citing *Ritholz v. Johnson* (1944), 246 Wis. 442, 17 N. W. (2d) 590. In that case the evidence showed that plaintiffs' advertising operated to defraud the public, and it was held that the statute applied.

The language of sec. 153.10 in no way indicates that proof of fraud is necessary to spell out an offense under its price advertising prohibition. The practice which the statute is intended to protect the public against is that of filling a prescription to meet the price rather than the needs of the patient. To permit price advertising on the part of those who deal with the human eye, even truthful advertising, is to leave the door open for the unscrupulous

practitioner to lure and to defraud unsuspecting members of the public. In the *Johnson case, supra,* this court relied heavily upon *Semler v. Oregon State Board of Dental Examiners* (1935), 148 Ore. 50, 34 Pac. (2d) 311, 294 U. S. 608, 55 Sup. Ct. 570, 79 L. Ed. 1086, where the court stated that the question was whether the kind of advertising prohibited afforded the unscrupulous practitioner a means of perpetrating fraud anqd deception upon his patients. It was there recognized that although there is nothing harmful in itself in merely advertising prices, there could be no doubt that unethical practitioners do resort to price advertising methods to lure the credulous to their offices for the purposes of fleecing them.

The second question is:

If secs. 153.10 and 153.11 are applicable to plaintiffs' activities, are they constitutional?

Although there are some cases to the contrary, as stated in *Ritholz v. Commonwealth* (1945) 184 Va. 339, 35 S. E. (2d) 210, 223:

> "The better reasoned cases hold that restrictions and regulations of the sale of eyeglasses are measures directed to the prevention of substantial harm to the public health and are within the exercise of the police power of the state."

In discussing the work of the optician in the production of glasses, the court in *City of Springfield v. Hurst* (1943), 144 Ohio St. 49, 56 N. W. (2d) 185, 188, reached the same conclusion as the Virginia court, saying:

> "Quality of material and skill in workmanship are prime essentials in producing the finished lenses. Poor quality and poor grinding will naturally result from the desire to sell spectacles in quantity at a low advertised price, with the purchase of underselling the op-

tometrist and other opticians who do not indulge in such advertising. Poor and improperly ground lenses will impair the eyesight of the person to whom they are sold as properly fitted. Thus, legislation prohibiting such bait advertising has a real and substantial relation to the public health whatever vendor employs the injurious method. The result of forbidding the professional practitioner to resort to such advertising and permitting the optician (or even the retail vendor) to indulge in the harmful practice does not eradicate the evil. The whole field must be covered if protection is to be afforded the public.

"Therefore, an ordinance which prohibits advertising the price of lenses or complete eyeglasses is a reasonable and valid exercise of the police power."

Plaintiffs' argument that they are merely merchants has no merit. We cannot see that eyeglasses are any more merchandise than dentures. Both are prepared according to the needs of the individual. "Furnishing glasses as such affects the public health as does furnishing dentures," this court said in *Ritzholz v. Johnson, supra,* p. 453. In fact, it seems to us that a person's health may be more gravely endangered by wearing improper glasses than by wearing improper dentures.

Articles such as clothing or shoes are merchandise, purchased by the consumer for comfort and warmth. Eyeglasses are worn for correctional purposes. The customer himself knows whether a suit or a pair of shoes fit him and will serve the purposes for which he intends them; and if they do not, he suffers no harm. But he must rely on the word of the optician or optometrist that the glasses sold to him contain the proper correction for his vision; and if the correction is wrong he may very well sustain lasting injury to his eyes. This is clearly a matter of public health.

The last question is:

Has Congress pre-empted the field of interstate advertising in the optical industry so as to deprive the state of jurisdiction to regulate in this field?

The rule has been stated in *Metropolitan Finance Corp. v. Matthews* (1953), 265 Wis. 275, 278, 61 N. W. (2d) 502, as follows:

> "If plaintiff's business, although in interstate commerce, has incidents and requires activities within the state intimately related to local welfare, then those incidents and activities are subject to state regulation under the police power, unless Congress has, by appropriate legislation, pre-empted the field with reference thereto."

Plaintiffs base their argument on the provisions contained in 15 U. S. C., sec. 52, which they contend is a comprehensive regulatory plan controlling price advertising in interstate commerce. A reading of the statute will show that it prohibits only *false* advertising as an unfair or deceptive act in commerce. Congress has not seen fit to include within the scope of federal legislation the dissemination of truthful advertising. Thus the federal act does not cover the subject matter of sec. 153.10, Stats., and does not by pre-emption preclude the state from so exercising its police power. As stated in *Kelly v. Washington* (1937), 302 U. S. 1, 10, 58 Sup. Ct. 87, 82 L. Ed. 3:

> "There is no occupational rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action,

is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'"

All of the authorities relied upon by plaintiffs deal with *false* representations in advertising relating to optical goods. None of them involve truthful advertising of prescription eyeglasses. Since the prohibition of such truthful advertising is a proper exercise of the state's police power, as pointed out above, and the federal government has clearly limited its control to the field of false advertising, sec. 153.10, Stats., is constitutional. There is nothing in the statute which is repugnant to or incompatible with the federal act.

Our opinion in this case would be incomplete without a word of appreciation for the exhaustive decision prepared by the trial court. The thorough study and consideration of the questions which it put into the decision have been of substantial assistance to this court on appeal.

By the Court.—Judgment affirmed.

APPENDIX C.

Judgment.

This cause coming on for trial before the Court, Honorable Myron L. Gordon, Circuit Judge, presiding, and the said Judge having filed his decision, and Order Granting Defendants' Motion for Summary Judgment and Order for Judgment wherein Judgment is directed to be entered as hereinafter provided:

On Motion of defendants' attorneys,

It Is Adjudged pursuant to sec. 269.56, Wis. Stats., the Declaratory Judgments Act, that:

1. The word "any person" in sec. 153.10, Wis. Stats., include the plaintiffs.

2. Said sec. 53.10 is a constitutional and enforceable statute.

3. The advertisements annexed to the complaint as Exhibits B through J, inclusive, are in violation of said sec. 153.10 in that said advertisements "either directly or indirectly" set forth a "definite or indefinite price."

4. The defendants are not entitled to injunctive relief.

5. No costs shall be taxed by any party. Balance of clerk's fees, if any, are to be paid by plaintiffs.

Dated: April 4, 1958.

By the Court

Myron L. Gordon, /s/
Circuit Judge.

Approved as to form.

Dated: April 1, 1958.

Alfred G. Goldberg,
Attorney for Plaintiffs.

APPENDIX D.

Article I, Section 8 of the United States Constitution, in material part provides:

> "The Congress shall have power . . . to regulate commerce . . . among the several states . . . And to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

Article VI, Section 2 of the United States Constitution in material part provides:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

15 U. S. C., Section 45 (a) provides:

> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> "The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to chapter 9 of Title 49, and persons, partnerships, or corporations subject to sections 181-203, 205-228 and 229 of Title 7, except as provided in section 227 of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

15 U. S. C., Section 52 provides:

"(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

"(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

"(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

"(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 45 of this title. Sept. 26, 1914, c. 311, § 12, as added Mar. 21, 1938, c. 49, § 4, 52 Stat. 114."

15 U. S. C., Section 55 (a) (1) and (d) provide:

"(a) (1) The term 'false advertisement' means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of

"a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug.

• • • • • • • • •

(d) The term 'device' [except when used in subsection (a) of this section] means instruments, apparatus, and contrivances, including their parts and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals."

APPENDIX E.

Filed December 19, 1955.

United States of America.

Before Federal Trade Commission.

In the Matter of Benjamin D. Ritholz, Samuel J. Ritholz, Sylvia Ritholz, Morris L. Ritholz, Fannie Ritzholz, Sophie Ritholz, Jacob Bedno and Anna Bedno, Individually and as Co-partners Trading Under the Names of Chicago Invisible Contact Lens Service, D. C. Invisible Contact Lens Service, Pittsburgh Invisible Contact Lens Service, Fort Wayne Invisible Contact Lens Service, and Other Names.	Docket No. 6155.

Initial Decision.

By J. Earl Cox,
Hearing Examiner.

The complaint charges that the respondents named in the caption hereof have violated the Federal Trade Commission Act by disseminating false and misleading advertising relating to corneal contact lenses which they manufacture and sell in commerce. Respondents filed an answer denying these charges. Thereafter hearings were held at which testimony and other evidence were received in support of and in opposition to the allegations of the complaint, duly recorded and filed in the office of the Commission. Thereafter proposed findings were presented by counsel.

Upon consideration of the entire record, the following findings are made:

1. Respondents Benjamin D. Ritholz, Samuel J. Ritholz, Sylvia Ritholz, Morris L. Ritholz, Fannie Ritholz, Sophie Ritholz, Jacob Bedno and Anna Bedno, individually and as copartners trading under the names of Chicago Invisible Contact Lens Service, D. C. Invisible Contact Lens Service, Pittsburgh Invisible Contact Lens Service, Fort Wayne Invisible Contact Lens Service, Flint Invisible Contact Lens Service, Lansing Invisible Contact Lens Service, King Optical Company, Midwest Scientific Company, and other names, are engaged in the sale of corneal contact lenses, having their principal place of business located at 1148 Chicago Avenue, Chicago, Illinois. Respondents maintain numerous branch offices located in various cities scattered throughout the United States, including Atlanta, Georgia; Birmingham, Alabama; Minneapolis, Minnesota; Kansas City and Springfield, Missouri; South Bend and Fort Wayne, Indiana; and Lansing and Flint, Michigan.

2. Respondents are now, and for some years last past have been, engaged in the manufacture and sale of corneal contact lenses and other optical supplies. Corneal contact lenses are designed to correct errors and deficiencies in the vision of the wearers, and are devices, as "device" is defined in the Federal Trade Commission Act. Respondents carry on their business through their branch offices in the following manner. Persons calling at the branch offices, unless they already have prescriptions, are referred to optometrists, who examine the eyes of such persons, write prescriptions and charge fees for such examinations. The prescriptions then are taken by such persons to respondents' branch offices and are forwarded by the branch offices to respondents' main office or factory in Chicago, where corneal lenses are prepared in accordance with the prescriptions. The lenses are sent back to the various

branch offices, and are there fitted to the eyes of the individual customers. In transacting this business, respondents maintain a substantial course of trade in commerce.

3. In connection with their business respondents have disseminated advertisements concerning their said devices by the United States mails and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including advertisements in newspapers, circulars and pamphlets, for the purpose of inducing, and which were likely to induce, the purchase of said devices.

Among the statements contained in respondents' advertising matter, so circulated, are the following:

(1) "An amazing new invention by Hornstein of Budapest has startled the optical world. His invention is on file in the United States Patent Office. It is comprised of a tiny glass disk, smaller than a dime and it is radically different from all contact lenses. There is no feeling in the eye from it.

"Clinical tests on numerous persons in all walks of life, *over long periods of time*, give convincing proof that they can be worn all day long with complete comfort and that there is no feeling in the eye from them. * * *" (Emphasis supplied.)

(2) "Wear them every waking moment with ease and comfort."

(3) "Floating fluidless contact lens are a natural for you if you wear glasses."

(4) "Throw away your glasses."

(5) "Worn by thousands from rising to bedtime."

(6) "Wear new miniature 'all day' corneal contact lenses."

(7) "Safer and better than glasses."

(8) "Can anyone be fitted with contact lenses? Almost anyone who wears glasses can secure the same or even better visual aid from Contact Lenses."

(9) "It takes very little time to become accustomed to them so that they may be worn indefinitely."

(10) "Remember you can now get these 'all day' miracle lenses for $49.95 a pair. They are the identical lenses others charge $125 to $200. You can save yourself $75 to $150. * * * The price now is only $49.95."

(11) "Special introductory offer! $125 to $150 value reduced to only $50."

4. Through these and similar statements respondents have represented that:

(1) Respondents' lenses are a new invention and are radically different from other corneal lenses;

(2) There is no feeling in the eye when respondents' contact lenses are worn, and that they may be worn all day without discomfort to the wearer;

(3) Said contact lenses are safer than eyeglasses;

(4) Said contact lenses provide better vision than eyeglasses;

(5) Persons who purchase respondents' contact lenses can discard their eyeglasses; and

(6) Respondents' lenses are of a value of $150 to $200 and have been sold by them and others for that amount, but have been reduced by respondents to $50.

5. As to each of the aforementioned representations the facts are:

(1) Respondents urge that the word "new" is a relative term, that it refers to something that has been in existence "but a short time." It is an indefinite expres-

sion. As was pointed out, we speak of the New Testament, although it is centuries old. We talk of new remedies, new eras and the new look—mostly in a most general way, without any specific period in mind. The word "new" does not carry any specific time limitation.

Various types of spectacles have been worn for centuries to give relief for defective vision. Certain types of contact lenses have been worn for several decades. Corneal contact lenses are of a later origin, and the Hornstein lens is one of the more recent modifications of the contact lens, so it is of comparatively recent origin. To describe it as "new" is therefore not beyond the bounds of the reasonable and ordinary application of that term.

But respondents add that their lenses "are radically different from other corneal lenses." Here they are using terminology that does have specific connotation. The word "radically" means completely, thoroughly, fundamentally. Respondents' corneal lenses are not *radically* different from other corneal contact lenses.

Contact lenses fall into two general classifications—the scleral type which covers most, if not all, of the visible portion of the eyeball, and the corneal type, which covers a surface of the eyeball only slightly larger than the cornea itself. There are several varieties of corneal lenses.

The Hornstein lens is a convex plastic disc. The central portion, varying from 6 to 9 millimeters in diameter, is domed with a radius shorter than that of the cornea; surrounding this is a 3 to 5 millimeter flange which has a greater radius than the central portion, making it somewhat flatter so that it conforms closely to the curvature of the eyeball; the edge is rounded so that it will not be irritating. The radius of the central dome-shaped part of the lens may be varied to produce the necessary correction of vision required by the individual wearer. It also

tends to create a vacuum, thus helping to hold the lens in place.

Many of the other corneal lenses have a uniform radius of curvature and fit more closely to the eyeball throughout. There may be other variations in detail, but all operate on the same principle and serve the same purpose. All can be made to provide the desired corrective effect on vision.

(2) Individuals differ, physically and psychologically. Some can wear the corneal lenses manufactured and sold by respondents with a reasonable degree of comfort. There is some sensation or feeling when contact lenses are first fitted, to which the wearer may later become insensitive, or which, on the other hand, may increase to such a degree that the lenses cannot be worn for any appreciable length of time. Some persons cannot wear contact lenses at all; some can wear them for a few hours only; while others, fewer in number, can wear them all day, even to the extent of discarding the eyeglasses formerly used. There is a wide variation in this respect, depending upon individual idiosyncrasies. There is no general rule applicable to all.

(3) Some persons, after becoming accustomed to corneal contact lenses, wear them for all purposes in place of eyeglasses and so discard the eyeglasses they had previously used; others use them for appearance sake when engaged socially or professionally, retaining their eyeglasses for non-public occasions; still others use them in sports which involve physical contact because the corneal lenses, being of pastic, do not break or shatter as eyeglasses might. Again the question of comfort arises, and it cannot be said, as a general rule, that purchasers of corneal lenses can discard their eyeglasses.

(4) As to comparative safety, there is likewise no generally applicable rule. As stated above, corneal lenses, being of plastic, will not shatter or easily break; they are

less exposed to the danger of being struck by foreign objects than eyeglasses; they do not become fogged by sudden changes of temperature, and are not affected by perspiration, rain or other dampness. On the other hand, they may slip out of position at critical moments and, if not properly fitted, may cause abrasions and trauma. For all persons and all purposes they are not safer than eyeglasses.

(5) Eyeglasses provide opportunity for a wider range of adjustments than do corneal contact lenses because of the variety of simple lenses that may be used and because of the availability of dual corrections through the use of bifocal combinations. In some cases, particularly those involving malformation of the cornea, contact lenses provide improvement of vision not possible through the use of eyeglasses. It cannot be said of either device that in all instances and under all circumstances it is best.

(6) Respondents' corneal lenses do not have a value of $150 or $200, nor any other value in excess of that which respondents regularly and customarily charge, which, according to the evidence, varies from $49.95 to $75.00 per pair. There is no evidence to establish that identical lenses have been sold by respondents or by others for from $125 to $200. It does appear that there is much variance in the price which a purchaser may be required to pay for corneal contact lenses. Before a purchaser may procure respondents' lenses he is usually obligated to consult an oculist, optician or optometrist for examination and prescription. Respondents' advertised prices do not include these services, nor does the record show what these additional services ordinarily cost. A person with impaired vision might visit an oculist, optometrist or optician and be charged $125, $150 or more for complete services, including examination, prescription, treatment if necessary, lenses, fitting services and further necessary adjustments. He might

be charged much less. Since the type and quantity of services that are furnished with lenses may vary widely, no basis exists for making price comparisons, and faulty conclusions may be drawn from the statements made by respondents.

Conclusions.

On the basis of the facts of record as established by substantial, reliable and probative evidence, the conclusion must be reached that much of respondents' advertising is false and deceptive. Their lenses are not radically different from other corneal contact lenses; there is some feeling in the eye when they are worn, particularly when first worn; in some instances, corneal contact lenses may be worn without discomfort all day; in some instances eyeglasses may be discarded; in some instances contact lenses are safer and provide better vision than eyeglasses, but these are individual instances, and not of universal or even general occurrence as respondents' advertising would lead a prospective purchaser to believe. The prices advertised by respondents are not reduced prices, nor are identical lenses sold by others for from $150 to $200.

The use by respondents of the foregoing advertisements, and the false, deceptive and misleading statements contained therein, has had and now has the capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true and into the purchase of respondents' corneal contact lenses because of such erroneous and mistaken belief.

The acts and practices of respondents herein found to be false and deceptive are all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. Accordingly,

It Is Ordered that Benjamin D. Ritholz, Samuel J. Ritholz, Sylvia Ritholz, Morris L. Ritholz, Fannie Ritholz, Sophie Ritholz, Jacob Bedno and Anna Bedno, trading under the names of Chicago Invisible Contact Lens Service, D. C. Invisible Contact Lens Service, Pittsburgh Invisible Contact Lens Service, Fort Wayne Invisible Contact Lens Service, Flint Invisible Contact Lens Service, Lansing Invisible Contact Lens Service, King Optical Company, Midwest Scientific Company, or any other name or names, their representatives, agents and employees, directly or through any corporate or other device, in connection with the sale of contact lenses, do forthwith cease and desist from directly or indirectly:

1. Disseminating or causing to be disseminated any advertisement, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisements represent, directly, indirectly or by implication:

(a) That there is no feeling in the eye when respondents' contact lenses are worn;

(b) That respondents' corneal contact lenses can be worn all day without discomfort;

(c) That the wearing of respondents' contact lenses is always safer than the wearing of eyeglasses;

(d) That respondents' contact lenses provide better correction of defective vision than eyeglasses except in the cases of those persons who have malformation of the cornea;

(e) That eyeglasses can always be discarded upon the purchase of respondents' corneal contact lenses;

2. Disseminating or causing to be disseminated any advertisement, by any means, for the purpose of in-

ducing or which is likely to induce, directly or indirectly, the purchase, in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said contact lenses, which advertisement contains any of the representations prohibited in paragraph 1 hereof.

It Is Further Ordered that the aforesaid respondents, in connection with the offering for sale, sale and distribution of contact lenses in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing:

1. That the difference between respondents' and all other corneal contact lenses is radical or fundamental;

2. That the price at which respondents' corneal contact lenses are offered for sale is a reduced price, unless such price is substantially less than the price at which the same lenses were being sold by respondents immediately prior to the announcement of such reduced price;

3. That any price at which respondents' contact lenses and services precedent and subsequent to the acquisition thereof are offered for sale represents a saving, unless such price is lower than that at which similar contact lenses and services are being offered by others in the same competitive area.

J. Earl Cox,
Hearing Examiner.

December 16, 1955.

United States of America.

Before Federal Trade Commission.

In the Matter of Benjamin D. Ritholz, Samuel J. Ritholz, Sylvia Rithōlz, Morris L. Ritholz, Fannie Ritzholz, Sophie Ritholz, Jacob Bedno and Anna Bedno, Individually and as Copartners Trading Under the Names of Chicago Invisible Contact Lens Service, D. C. Invisible Contact Lens Service, Pittsburgh Invisible Contact Lens Service, Fort Wayne Invisible Contact Lens Service, and Other Names.	Docket No. 6155.

Complaint.

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Benjamin D. Ritholz, Samuel J. Ritholz, Sylvia Ritholz, Morris L. Ritholz, Fannie Ritholz, Sophie Ritholz, Jacob Bedno and Anna Bedno, individually and as copartners trading under the names of Chicago Invisible Contact Lens Service, D. C. Invisible Contact Lens service, Pittsburgh Invisible Contact Lens Service, Fort Wayne Invisible Contact Lens Service, and other names, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph One: Respondents Benjamin D. Ritholz, Samuel J. Ritholz, Sylvia Ritholz, Morris L. Ritholz, Fannie Ritholz, Sophie Ritholz, Jacob Bedno and Anna Bedno

are individuals trading individually and as partners under the names of Chicago Invisible Contact Lens Service, D. C. Invisible Contact Lens Service, Pittsburgh Invisible Contact Lens Service, Fort Wayne Invisible Contact Lens Service, and other names, with their principal place of business at 1148 Chicago Avenue, Chicago, Illinois, and with branch offices and places of business in a number of other cities in other States, including Fort Wayne, Indiana, Pittsburgh, Pennsylvania, and Washington, D. C.

Paragraph Two: The respondents are now, and for some years last past have been, engaged in the manufacture and sale of corneal contact lenses and other optical supplies. Corneal contact lenses are devices designed to correct errors and deficiencies in the vision of the wearer, and are devices, as "device" is defined in the Federal Trade Commission Act. The respondents carry on their business through their branch offices in the following manner. Persons calling at the branch offices are referred to an optometrist, usually in accordance with prior arrangements made by respondents with such optometrists. These optometrists examine the eyes of such persons, write prescriptions in accordance with their findings, charging such persons a fee for such examination and prescriptions. The prescriptions are taken by such persons to respondents' branch offices and are forwarded by the branch offices to respondents' main office or factory in Chicago where corneal lenses are ground for the individual customers through the use of the individual prescriptions. When the lenses are completed, they are sent from respondents' factory to the various branch offices, from which the prescription was forwarded, and are there fitted to the eyes of the individual customers for whom they had been ordered. Respondents maintain a course of trade in commerce in the transmission of the individual prescriptions from their branch offices located in various States to the main office or factory located in the State of Illinois and in the ship-

ping of the lenses for the individual customers from the State of Illinois to the various branch offices aforesaid.

Paragraph Three: In the course and conduct of their aforesaid business, respondents have disseminated and have caused the dissemination of advertisements concerning their said devices by the United States mails and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers and by means of circulars and pamphlets, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said devices; and respondents have also disseminated and caused the dissemination of advertisements concerning their said devices by the aforesaid means for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of their said devices in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations contained in advertisments disseminated and caused to be disseminated, as aforesaid, are the following:

"• • • There is no feeling in the eye from it."

"Wear them every waking moment with ease and comfort."

"Wear new miniature 'all-day' corneal contact lenses."

"Safer and Better than Eyeglasses."

"Can anyone be fitted with contact lenses?"

"Almost anyone who requires glasses can secure the same or even better visual aid from contact lenses."

"Floating Fluidless Contact Lenses are a natural for you if you wear glasses."

"Throw away your glasses."

"You do not have to wear glasses! Wear 'Nu-Vue' Fluidless Contact Lenses."

Paragraph Four: By and through the statements made in said advertisements disseminated and caused to be disseminated, as aforesaid, respondents represented, directly or by implication:

1. That there is no feeling in the eye when respondents' contact lenses are worn.

2. That said contact lenses may be worn all day without discomfort to the wearer.

3. That said lenses are safer than eyeglasses.

4. That said lenses provide better vision in all instances than eyeglasses.

5. That persons who purchase respondents' lenses can discard their eyeglasses.

Paragraph Five: The advertisements containing the aforesaid statements and representations are misleading in material respects and constitute "false advertisements," as that term is defined in the Federal Trade Commission Act. In truth and in fact:

1. Most persons will feel the presence of respondents' lenses in their eyes.

2. Practically all persons will experience some discomfort after starting the use of respondents' lenses. In the cases of a significant number of persons the discomfort will continue indefinitely. In some cases such discomfort will be so intolerable that the lenses cannot be worn all day.

3. The wearing of respondents' lenses causes abrasions on and intolerable irritations to the eyeballs of significant numbers of persons. Said lenses are not safer for such persons than eyeglasses.

4. Only in a small minority of cases will respondents' lenses provide better vision than eyeglasses.

5. Most persons cannot discard their eyeglasses upon the purchase of respondents' lenses.

Paragraph Six: In the further course and conduct of their business, respondents have made further statements with respect to their said normal contact lenses in newspapers and other advertising media for the purpose of inducing and which were likely to induce the purchase of their said lenses in commerce, as "commerce" is defined in the Federal Trade Commission Act. Among and typical of the statements appearing in said advertisements are the following:

"An amazing new invention by Hörnstein of Budapest has startled optical world. His invention on file in the U. S. Patent Office comprises a tiny circular glass disc smaller than a dime and is radically different from all contact lenses. There is no feeling in the eye from it."

"Wear NuVue contact lenses. We believe them $125 to $150 value. Our price only $49.95."

"If you need or wear glasses you should be interested in a Washington contact lens firm's offer of their newly discovered corneal contact lenses which they believe to be $125 to $150 value for only $50.00."

"Special introductory $125 to $150 value reduced to only $50.00."

Paragraph Seven: Through the use of the aforesaid statements and others similar thereto, but not specifically set out herein, respondents have represented, directly and by implication:

1. That respondents' lenses are a new invention and are radically different from other corneal lenses.

2. That respondents previously sold their said lenses for from $125 to $150.00 and that the price had been reduced to $50.00.

3. That the lenses sold by them are of the value of $125.00 to $150.00.

Paragraph Eight: The advertisements containing the aforesaid statements and representations are false, misleading and deceptive. In truth and in fact:

1. Respondents' lenses are not a new invention and are the same or substantially the same as other corneal type contact lenses that have been on the market for some years.

2. Respondents have never sold their lenses for as much as $125.00. The price of $50.00 was not a reduction from the price ordinarily charged but was in fact the usual and customary charge for some time prior to the time of the publication of the offer.

3. Included in the cost of corneal contact lenses selling for $125.00 and $150.00 are valuable services not provided by respondents, including such number of fittings as may be required to provide the maximum benefits. Respondents, therefore, cannot attribute value to their lenses which do not include all services and other benefits accruing to purchasers of similar products from others.

Paragraph Nine: Respondents' advertisements offering their said corneal lenses were false and misleading for the further reason that they offer their said lenses at a stated price but fail to reveal the material fact that, before the lenses can be obtained at such price, it is necessary that the eyes of the person be examined by a qualified and licensed person, a prescription written and payment made for such examination and prescription, in addition to the amount charged by respondents for their lenses.

Paragraph Ten: The use by the respondents of the above-referred to advertising representations, disseminated as aforesaid, has the tendency and capacity to mislead and

deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all such representations are true and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase their said devices.

Paragraph Eleven: The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Wherefore, the Premises Considered, the Federal Trade Commission, on this 30th day of December, A. D., 1953, issues its complaint against said respondents.

Notice.

Notice is hereby given you, Benjamin D. Ritholz, Samuel J. Ritholz, Sylvia Ritholz, Morris L. Ritholz, Fannie Ritholz, Sophie Ritholz, Jacob Bedno and Anna Bedno, individually and as copartners trading under the names of Chicago Invisible Contact Lens Service, D. C. Invisible Contact Lens Service, Pittsburgh Invisible Contact Lens Service, Fort Wayne Invisible Contact Lens Service, and other names, respondents herein, that the 24th day of February, A. D., 1954, at 10 o'clock is hereby fixed as the time and Federal Trade Commission Offices, Chicago, Illinois, as the place when and where a hearing will be had before J. Earl Cox, a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on

or before the twentieth (20th) day after service of it upon you. Such answer shall contain a concise statement of the facts which constitute the ground for defense and shall specifically admit or deny each of the facts alleged in the complaint unless you are without knowledge, in which case you shall so state. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

If respondents desire to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondents admit all the material allegations of fact charged in the complaint to be true. Such answer will constitute a waiver of any hearing as to the facts alleged in the complaint and findings as to the facts and conclusions based upon such answer shall be made and order entered disposing of the matter without any intervening procedure. The respondents may, however, reserve in such answer the right to submit proposed findings and conclusions of fact or of law under Rule XXI, and the right to appeal under Rule XXIII.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 30th day of December, A. D., 1953.

By the Commission.

Seal.

Alex. Akerman, Jr.,
Secretary.

FILE COPY

Office-Supreme Court, U.S
FILED
JUN 19 1959
JAMES R. BROWNING, Clerk

In The

Supreme Court of the United States

October Term, 1958

No. 953

ANNA BEDNO, JACOB BEDNO, SAMUEL J. RITHOLZ, SYLVIA RITHOLZ, MORRIS I. RITHOLZ, FANNY RITHOLZ, BENJAMIN D. RITHOLZ, SOPHIE RITHOLZ, Co-partners Doing Business Under the Assumed Name, Designation and Style of KING OPTICAL COMPANY,

Petitioners,

vs.

DAN B. FAST, AUGUSTUS N. ABBOTT, FRED N. HARRIS, EDWARD D. LA COURSE, NEWTON E. W. LENZ, as the Wisconsin Board of Examiners in Optometry, and WILLIAM J. McCAULEY, District Attorney for Milwaukee County, Wisconsin,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE GILMAN PRESS, MADISON, WIS.

INDEX

	PAGE
Citation to Opinion Below	1
Jurisdiction	2
Question Involved	3
Constitutional and Statutory Provisions Involved	4
Statement	4
Reasons for Denying the Writ	5
1. *A state is free in the interests of public health to prohibit ALL price advertising of eyeglasses, and a federal statute designed to prevent only unfair and deceptive acts or practices in commerce does not constitute a pre-emption of the entire field of eyeglass advertising*	5
2. *The federal statues are aimed at fraudulent advertising only and cannot be invoked to prohibit truthful price advertising*	6
3. *Congress was not required to occupy the whole field and its intention to do so is not to be inferred from the fact that it has seen fit to occupy a limited field*	8
Conclusion	9

CASES CITED

Kelly v. Washington (1937) 302 U. S. 1	8
Ritholz v. Johnson (1945) 246 Wis. 442, 17 N. W. 2d 590	8

PAGE

Savage v. Jones (1911) 225 U. S. 501 8

Semler v. Oregon State Board of Dental Examiners (1943) 294 U. S. 608 7

Shafe v. Federal Trade Commission (1958 U. S. Court of Appeals, 6th Circuit) 256 Fed. 2d 661 6

Williamson v. Lee Optical Co. of Okla., Inc. (1955) 348 U. S. 483 5

STATUTES INVOLVED

15 U. S. C. § 45 (a) 4

15 U. S. C. § 52 (a-b) 4

15 U. S. C. § 55 (a) (1) 4

15 U. S. C. § 55 (d) 4

Wis. Stats. § 153.10 (1957) 4, 5

CONSTITUTION

United States Constitution

Article I, Section 8 4

Article VI, Section 2 4

In The

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October Term, 1958

No.....

ANNA BEDNO, JACOB BEDNO, SAMUEL J. RITHOLZ, SYLVIA RITHOLZ, MORRIS I. RITHOLZ, FANNY RITHOLZ, BENJAMIN D. RITHOLZ, SOPHIE RITHOLZ, Co-partners Doing Business Under the Assumed Name, Designation and Style of KING OPTICAL COMPANY,

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CITATION TO OPINION BELOW

(March 3, 1959) 6 Wis. 2d 471, 95 N. W. 2d 396.

JURISDICTION

The judgment of the Wisconsin Supreme Court affirmed that of the Circuit Court for Milwaukee County on summary judgment motions by both parties in an action for declaratory judgment and injunction. It was adjudged that in the regulation of the furnishing of eyeglasses in the interests of public health the state may prohibit all price advertising and that the federal statute which prohibits false advertisement of devices such as eyeglasses does not cover the same subject matter as the state statute and does not by pre-emption preclude the state from so exercising its police powers.

QUESTION INVOLVED

Is a state precluded from abolishing all price advertising of eyeglasses because a federal statute prohibits false advertising of such devices?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to Art. I, Section 8, Art. VI, Section 2 United States Constitution, 15 U.S.C. § 45 (a), § 52 (a-b) and § 55 (a) (1) and (d) referred to at p. 3 of the Petition reference is made to Section 153.10, Wisconsin Statutes (1957), printed in Appendix B to the Petition, p. 26, as a part of the Wisconsin Supreme Court's opinion, and in footnote 3, p. 7 of the Petition.

STATEMENT

The only amplification of the Statement of the Petitioners which Respondents would like to make is that there was no allegation in the pleadings that any of the price or other advertising of petitioners in the Milwaukee newspapers or elsewhere was false, misleading, fraudulent, deceiving, or for the purpose of causing misunderstanding. It was admitted in the Answer that such statements were full, fair, complete and truthful, and all articles advertised were actually of the type, kind, quality and description set forth in the advertisements. Appendix B of Petition, p. 26. Thus no issue of fact on this point was raised by the respective motions for summary judgment.

REASONS FOR DENYING THE WRIT

1. *A state is free in the interests of public health to prohibit ALL price advertising of eyeglasses, and a federal statute designed to prevent only unfair and deceptive acts or practices in commerce does not constitute a pre-emption of the entire field of eyeglass advertising*

The Wisconsin Statute, Sec. 153.10 (1957 Stats.) prohibits *all* price advertising of eyeglasses. The fact that such advertising may be honest and fair is no defense as it would be under the federal statutes cited in the Petition.

In *Williamson v. Lee Optical Co. of Okla., Inc.*, (1955) 348 U. S. 483, the Oklahoma statute made it unlawful to solicit the sale of eyeglasses by any means of advertisement, and it was said at p. 490:

> "* * * Or it [the legislature] might conclude that both the sellers of frames and the sellers of lenses were in a business where advertising should be limited or even abolished in the public interest. * * *"

Also at p. 490:

> "* * * We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers. * * *"

While the optical company in the *Oklahoma* case did not rely on the Federal Trade Commission statutes cited here, the petitioners in the instant case have pointed to no cases or proceedings where federal statutes have been invoked other than those in which fraud and deception were claimed.

2. *The federal statutes are aimed at fraudulent advertising only and cannot be invoked to prohibit truthful price advertising*

"It is the dissemination of false advertising that the statute is directed against." *Shafe v. Federal Trade Commission* (1958 U. S. Court of Appeals, 6th Circuit) 256 Fed. 2d 661, 663.

It is contended at pp. 9 and 10 of the Petition that an advertisement containing completely truthful statements can be a false advertisement within the meaning of the federal statute, and that this may be because things are omitted that should be said, or because advertisements are composed or purposely printed in such a way as to mislead.

No one would deny that under such circumstances there would be "unfair or deceptive practices in commerce" within the meaning of the federal statute, but it is the unfairness or deceptiveness that is the subject of the attack rather than price advertising which the Wisconsin Statute wholly abolishes. In other words, the rationale of the Wisconsin Statute is that the public interest in visual care requires that eyeglasses should be furnished to meet the needs of the patient rather than to meet an advertised price, though a truthful one.

There are no allegations here that petitioners' advertisements are misleading although literally true, and Appendix E of the Petition, which consists of a copy of a Federal Trade Commission proceeding against petitioners shows that in such proceeding the petitioners were charged with disseminating false and misleading advertisements. Petitioners advertised that their $49.95 contact lenses were

identical with those advertised by others from $125 to $200 and that the price was reduced as a special introductory offer. Petition, p. 42.

The commission's decision held that the petitioners' lenses did not have a value of $125 to $200 nor any other value in excess of that which petitioners regularly and customarily charged. Petition, p. 45. This and other advertising statements by petitioners were found to be false, deceptive, and misleading within the intent and meaning of the Federal Trade Commission Act. Petition, p. 46.

It is accordingly impossible to equate such advertising with truthful price advertising which is prohibited under the Wisconsin Statute but which is not prohibited under the Federal Statute.

The two statutes operate in two entirely different orbits. The Federal Statute is concerned with unfair and deceptive acts in trade or commerce. The State Statute is based on the theory that the furnishing of prescription eyeglasses designed to fit a particular patient is a service pertaining to health and safety and that in prohibiting all price advertising of such eyeglasses the legislature was not dealing with traders in commodities. In other words, the purpose of the State Statute is exactly the same as that discussed in *Semler v. Oregon State Board of Dental Examiners* (1943) 294 U. S. 608, 612, where this court upheld a state statute prohibiting price advertising of dental prices even though such advertising might be free from deception in particular instances.

> "We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with

traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. * * *"

The same reasoning applies here, since "Furnishing eyeglasses as much affects the public health as does furnishing dentures." *Ritholz v. Johnson* (1945) 246 Wis. 442, 453, 17 N. W. 2d 590.

3. Congress was not required to occupy the whole field and its inteniton to do so is not to be inferred from the fact that it has seen fit to occupy a limited field

In *Kelly v. Washington* (1937) 302 U. S. 1, 10, this court in considering the question of pre-emption said:

"There is no occupational rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' "

Likewise in *Savage v. Jones* (1911) 225 U. S. 501, 533:

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe

its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State."

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari herein should be denied.

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